

United States  
**COURT OF APPEALS**  
for the Ninth Circuit

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LOUIE HOY GAY,

*Appellant,*

vs.

JOHN FOSTER DULLES, Secretary of State of  
the United States of America,

*Appellee.*

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**APPELLEE'S BRIEF**

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*Appeal from the United States District Court for the  
District of Oregon.*

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PAUL P. O'BRIEN, CL.



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**OPINION BELOW**

Opinion of the District Court (R. 12), Findings of  
Fact and Conclusions of Law of the District Court (R.  
16-19) and Judgment (R. 20).

**JURISDICTION**

Jurisdiction of the District Court is invoked under  
Section 503 of the Nationality Act of 1940 (Title 8,  
USCA, Section 903). Jurisdiction of the Court of Ap-  
peals is invoked under the provisions of Title 28, USCA,  
Section 1291.

## **STATUTES INVOLVED**

Section 503 of the Nationality Act of 1940, 54 Stat. 1171. Title 8 USCA 903. [Quoted in its entirety by Appellant (App. Br. 2 & 3).]

Sec. 1993, Revised Statutes.

“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

## **STATEMENT OF THE CASE**

The appellant herein claims to be the son of Louie Foo, a resident of the State of Oregon and an alleged citizen of the United States, at the time of his birth in China. Appellant claims derivative citizenship under Revised Statute 1993.

The material portions of the complaint in issue are as follows:

### **I.**

“That Louie Hoy Gay, the plaintiff, is a citizen of the United States. \* \* \*

### **IV.**

“That the plaintiff, Louie Hoy Gay, was born on July 5, 1908, at Hong Me Village, Toy Sun District, Canton Province, China, and now resides at Number 4, Winglok Street, Hong Kong, China, and is a citizen of the United States under Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edition.

## V.

"That Louie Foo, the father of plaintiff, Louie Hoy Gay, was born in the City of Portland, Multnomah County, State of Oregon, on August 10, 1884, and ever since that time said Louie Foo has been and now is a citizen of the United States \* \* \*"

The answer to the complaint denies each of said allegations.

From a decision denying the petition for a declaration of citizenship, plaintiff appeals.

The sole issues, therefore, to be determined are as stated in the Judge's opinion (R. 12) as follows:

"In order to prevail, plaintiff must prove by a preponderance of the evidence (1) that he is the legal and natural son of Louie Foo and (2) that Louie Foo at the time of plaintiff's birth was a citizen of the United States."

In the Court's opinion (R. 15) two references are made to portions of the Immigration and Naturalization file. The first reference pertains to the interview of appellant and his alleged mother as conducted in Hong Kong by the American Consulate in connection with his application for passport. The second reference states that the Court only considered the statements of plaintiff's and documents submitted either by him or on his behalf. Clearly, the Court in each of these instances had reference to the passport file of the Department of State which was plaintiff's exhibit 7 and not the Immigration & Naturalization file (Def. Exh. 14).

## **SPECIFICATIONS OF ERROR**

Appellant has stated 7 specifications of error, but treats them collectively under two questions which, in substance, were stated in the opinion of the Court below (R. 12).

## **QUESTIONS PRESENTED**

The District Court in its opinion (R. 12) correctly sets forth the questions herein to be considered as follows:

“In order to prevail, plaintiff must prove by a preponderance of the evidence (1) that he is the legal and natural son of Louie Foo and (2) that Louie Foo at the time of plaintiff's birth was a citizen of the United States.”

## **SUMMARY OF ARGUMENT**

1. Plaintiff has failed to prove by a preponderance of the evidence that he is the legal and natural son of Louie Foo.

## **ARGUMENT**

The record shows that Louie Foo, a Chinese resident of the State of Oregon, went to China in the year 1907. In March 1907, he claims to have married a Chinese woman by the name of Ng Shee. Of this union, Louie Foo claims that on July 5, 1908, after he had returned to the United States from his trip to China, a son was born (R. 38). Louie Foo testified that this



child was named Louie Hoy Gay, and although an objection was made to this testimony (R. 37) the Court permitted the answer to stand. When Louie Foo returned to China on his next trip in 1921, he testified that the boy was then 13 or 14 years of age (R. 39). The Court had before it the entire passport file of the Department of State which, with the exception of the questioning of the plaintiff and his alleged mother at the Office of the American Consulate at Hong Kong, was introduced into evidence by Appellant (Def. Exh. 7). The balance of the State Department passport file was offered in evidence by Appellee and the same was admitted into evidence subject to Appellant's objection and the Court commented (R. 100) that he would decide later on whether or not it would go into evidence. In rendering his opinion, the Court apparently considered all of this record in its entirety except the questions and answers propounded to plaintiff's alleged mother, Ng Shee. This questioning was determined by the Court below to be inadmissible under the Rule of *Wong Wing Foo v. McGrath*, 9 Cir. 1952, 196 F.2d 120. Obviously, the only person having actual knowledge as to whether or not the plaintiff, Louie Hoy Gay, was in fact the son of Louie Foo, was the mother. The questions and answers as aforesaid propounded to the alleged mother by the interrogator in the Office of the American Consulate in Hong Kong would have contributed direct evidence of the relationship. This evidence was not considered since it was objected to by plaintiff himself. The interrogation of plaintiff in the Office of the American Consulate at Hong Kong was

admitted into evidence and the Court below, as did the interrogating officer at Hong Kong, considered the testimony of plaintiff very unsatisfactory. This part of Appellant's Exhibit 7 was clearly admissible under Title 28, Sec. 1733, "(a) Books or records of account or minutes of proceedings of any Department or Agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept; \* \* \*." See also *Lee Dong Sep v. Dulles*, CA 2, 220 F.2d 264. While the testimony of appellant contained in Exhibit 7 to the effect that he was the blood son of Louie Foo, and Louie Foo at the trial of this cause gave similar testimony (R. 37), all of which was uncontradicted, the Court below was not required to nor did he believe such evidence, nor did he accept it as true. See *Ly Shew v. Dulles*, CA 9, 219 F.2d 413, and cases cited therein.

On the basis of the testimony and proof submitted, the Court was justified in determining that it could not base a finding of citizenship upon testimony of that quality.

## **SUMMARY OF ARGUMENT**

2. If the Court below was justified in determining that plaintiff had not sustained the burden of proof of the fact that he was the son of Louie Foo, then that would be determinative of the within controversy or if the Court below was in error at arriving at its said determination or considered evidence which should not have been admitted (which appellee denies), then plain-

tiff had the burden of proving by a preponderance of the evidence that Louie Foo was in fact a citizen of the United States at the time of plaintiff's birth.

At the trial of this cause appellant placed reliance to prove this issue upon:

(a) United States passport issued to Louie Foo on April 3, 1952 as a citizen of the United States (Exh. 2).

(b) A Delayed Decree for Registration of Birth issued to Louie Foo on February 8, 1945, out of the Multnomah County Circuit Court for the State of Oregon, issued pursuant to Section 432.255, Oregon Revised Statutes (Exh. 3).

(c) Certificate of Identity, No. 54325 as a Merchant issued to Louie Foo by Immigration Officials, Seattle (Exh. 4).

(d) United States Army draft registration of Louie Foo (Exh. 5).

(e) Voting registration in Multnomah County, Oregon, from 1928 to 1941 (Exh. 6).

With the exception of plaintiff's delayed birth registration which appellee admits is prima facie evidence of birth, none of the other aforesaid exhibits have any legal weight as tending to prove the citizenship of Louie Foo. It is further contended by appellee that (Def. Exh. 14) the Immigration & Naturalization file concerning Louie Foo was properly admissible for impeachment purposes (R. 112). Any presumption that may have resulted in appellant's favor by virtue of the delayed birth registration, was fully overcome in cross examination of Louie Foo, and the Court was fully justified in determining as he did in referring to the answers of Louie Foo to the interrogatories of the Immigration & Naturalization Service that, "His answers to these interrogatories con-

cerning his early life and his parents were just as vague and just as unsatisfactory as his testimony at the trial." The Court's finding No. VII (R. 18), "That plaintiff had failed to prove by a preponderance of the evidence that said Louie Foo was a citizen of the United States by birth or naturalization" was correct and fully justified.

## ARGUMENT

Taking up the contentions of appellant in the order in which they are set forth in his brief, the first contention being (a) that Louie Foo was issued a passport by the United States government as a citizen of the United States on April 3, 1952, being Exhibit 2.

" \* \* \* A passport, when granted, is not conclusive, nor is it even evidence, that the person to who it is granted is a citizen of the United States." *Urtetiqui v. D'Arcy*, 9 Pet., 9 L. Ed. 276.

Counsel argues that it is unlikely that the State Department would issue a passport (Exhibit 2) unless they believed that Louie Foo was a citizen of the United States. We do not consider it necessary to argue this point further since counsel admits that the issuance of a passport "has been held not to be any evidence of citizenship, \* \* \*" (Br. 10).

(b) Decree of delay registration of birth—Section 432.280 ORS (Exh. 3).

No better argument can be made here regarding the weight that should be accorded to Exhibit 3 than that which appears in the opinion of Judge Solomon (R. 13 and 14) as follows:

“Plaintiff placed great reliance on a delayed decree for registration of birth issued to Louie Foo on February 8, 1945, showing that he was born on August 10, 1884. This decree was taken *ex parte*, and it was issued pursuant to Oregon Revised Statutes 432.280, which provides that a certified copy of such record ‘shall be *prima facie* evidence in all courts and places of the facts stated therein.’ This order recites:

‘Testimony of petitioner supporting allegations of Petition and that he is the owner of valuable real estate in Marion and Multnomah Counties in Oregon. Testimony of W. W. Banks, a reliable attorney, to the effect that he has personal acquaintance with and done legal services for petitioner for more than 40 years and that he has been a merchant during all of the time.’

“This abstract of supporting evidence clearly indicates the unsatisfactory basis upon which the order was issued. Neither the Secretary of State nor the United States nor any agency thereof was a party to these proceedings and are certainly not bound by this decree. *Ex parte, Lee Fong Fook*, D.C.N.D. Calif. 1948, 74 F. Supp.; *U. S. vs. Casares-Moreno*, D.C.S.D. Calif. 1954, 122 F. Supp. 375.”

See also *Marcelino Casares-Moreno v. United States of America*, CA 9, 226 F.2d 873, and *Mah Toi v. Brownell*, CA 9, 219 F.2d 642.

At best, this decree for delayed registration of birth is merely *prima facie* evidence of birth. It is not conclusive. In discussing the evidentiary weight of a birth certificate, this Court in the case of *Mah Toi v. Brownell*, *supra*, quoted with approval the following language from the case of *Otis & Co. v. Securities & Exchange*



*Commission*, 85 U.S. App. D.C. 122, 176 F.2d 34, 42, as follows:

“Prima facie evidence is a minimum quantity. It is that which is enough to raise a presumption of fact; or, again, it is that which is sufficient, when unrebutted, to establish the fact.”

But counsel urges (Br. 9) that since the said Decree of Registration of Birth is prima facie evidence of birth, that the burden of proof shifted to the adverse party. We do not agree that this is a correct statement of the law. Again referring to *Mah Toi v. Brownell*, supra, the Court stated:

“Appellant concedes that if the superior court order was not conclusive evidence of the fact of appellant’s native birth as a matter of law, its admission in evidence did not shift the burden of proving the fact, but merely required that substantial evidence rebutting the presumption be presented to the court, \* \* \*”

The question then would appear to be, is there sufficient evidence in the record to sustain the Trial Court’s finding of fact, at least to the extent of evenly balancing the weight of all the creditable evidence with no preponderance thereof in favor of the appellant.

Reference is made to the memorandum dated September 30, 1952, covering the testimony taken from Louie Hoy Gay in connection with his passport application (Def. Exh. 7, P. 3). Appellant testified that his grandmother had never been in the United States; that his father was actually born in Hung May Village, Toishan, 1884, and that his claim to American citizenship was by reason of the naturalization of his father in

the United States which he states was at a fairly recent date. He stated that his father had written him advising him of this fact. I think it is fair to assume that this reference to the father having become a naturalized citizen had reference to the Decree for Registration of Birth granted by Circuit Judge Walter L. Tooze on February 8, 1945 (Exh. 3).

A very interesting point presents itself through a question propounded by the court to Mr. Banks when he was making his opening statement (R. 27): "Why was he admitted on those two trips as a Chinese merchant rather than as a citizen? Mr. Banks: I will tell you why, your Honor. It is because it was much easier for a merchant to go than it was to offer proof of his citizenship, and that is the reason why that was done, but at all times on those two trips and at all times since he has claimed to be a citizen of the United States."

In Mr. Banks' opening statement (R. 30) in mentioning the different places where appellant's business was moved, he stated that this business "continued up to 1946 when a fire, if you will remember, up Washington Street, destroyed their store." See also Mr. Banks' statement (R. 50) when he said, "I have got \$7,000.00 insurance when that was destroyed in 1946, and he had many valuable documents in his trunk in the basement of that store, as he told you about, records of monies sent home, records of correspondence with his family, all that sort of thing." Louie Foo also testified that the fire occurred in the year 1946 (R. 77). Mr. Foo was then cross examined with reference to the contents of

his trunk in the basement of his business establishment (R. 96). He was asked the question:

“Q. Mr. Foo, in your testimony about the fire you said you had a trunk in the basement and you had a lot of personal belongings there?

A. Yes, sir.

Q. Or at least you said you had some photographs there?

A. Yes.

Q. Did you have any other evidence besides these photographs of the fact that you were born in this country?

A. I got birth certificate, photographs, fire burn up in the trunk.

Q. Did you have any evidence at all of your being born in this country?

A. Yes, sir.

Q. What was that evidence?

A. Some paper, birth certificate and photograph; all burned.

Q. That is the reason it has made it difficult now for you to prove your birth; is that right?

A. Yes.

Q. If you had that evidence that was burned in the trunk, then you would have that birth certificate, photographs and some papers; is that right?

A. Yes.”

This testimony seems incredulous. If he did in fact have a birth certificate in his trunk at the time of the fire in 1946, then why did he find it necessary to file a petition in the Circuit Court of the State of Oregon and appear before Judge Walter Tooze in February 1945 to secure a decree for delayed registration of his birth. It is to be remembered that this witness has testified that he operated a business for approximately 42 years; that he waited on the customers who were principally English-speaking people; that he took a business course in the



YMCA. Certainly the cross examiner did not attempt to confuse Mr. Foo; the testimony of his having a birth certificate, etc., was entirely voluntary on his part, and being a well educated man, he certainly knew what he was talking about. Therefore, in stating that he had a birth certificate in 1946, I think it can safely be said that Louie Foo was not telling the truth. This is not reliable testimony.

In appellee's statement of the case herein, attempt was made to clarify what is unquestionably a misstatement made by the Court in his opinion, when reference was made to the "Immigration & Naturalization file" (R. 15), when in fact the Court was referring to the Department of State passport file. The Court was talking about Exhibit 7, since he referred to the interviews conducted at Hong Kong and plaintiff's application for passport. This, then, could only pertain to the Department of State passport file. Appellant, in his brief (Br. 15) also makes the same error when he refers to "plaintiff (appellant's) statements referred to in the Immigration file" as having been considered by the Court and therefore he states that under *Wong Wing Foo v. McGrath*, 196 F.2d 120; *Lee Shew v. Brownell*, 219 F.2d 301, and *Mah Yong Og v. Clark*, 81 F. Supp. 696, and other cases cited (Br. 16), the Court was in error in admitting this document into evidence. As was heretofore stated the passport file was admissible under 28 USCA 1733, and *Lee Dong Sep v. Dulles*, *supra*.

Appellee introduced the Immigration & Naturalization file (Def. Exh. 14), solely for impeachment purposes (R. 112). Louie Foo made two trips to China and

upon his return each time, was interrogated by the Immigration & Naturalization agents. Certain impeaching questions were asked Mr. Foo under cross examination. Louie Foo had acknowledged these interrogations and acknowledged he had signed the documents about which he was being questioned.

“ \* \* \* It is legitimate crossexamination to confront a witness with former statements and permit or request him to explain.

“The trial before the district court was, of course, de novo and not a review of the Immigration hearings and the record shows that the court considered all of the evidence in that light.” *Wong Ken Foon v. Brownell*, CA 9, 218 F.2d 444, 446.

See also *Lee Dong Sep v. Dulles*, *supra*.

On November 30, 1924 and again on December 4, 1924, when Louie Foo returned from China after making his second trip to that country, he reported that he had had another child, whose name was Louie Hoy Park, a son, age 2 years. He denied having any daughters. At the trial he stated that in addition to his son Louie Hoy Gay, he also was the father of one daughter (R. 40, 80, 82). He testified that his daughter's name was Louie May Kin. He denied making the statement to the Immigration Department in 1924 that he had reported the birth of a son, Louie Hoy Park, 2 years old. He stated, “I all the time say I got one boy and one girl, that is all. Maybe someone make a mistake.” (R. 82). He was cross examined at some length in this regard, but maintained throughout that he only had the two children, the appellant herein and one daughter. It is significant, however, in referring to the Immigration & Naturaliza-

tion file (Def. Exh. 14), in three documents, all signed by Louie Foo, he reported the birth of another son, Louie Hoy Park. The first statement appears on Form M 149 entitled "Chinese Landed Direct from Steamer on Identification," dated November 30, 1924. The second statement was made in his interrogation on December 4, 1924, where he was asked if he had ever had any other children other than these two sons, and his answer was "No." At that time, he also denied having any daughters. Further in this connection is a document in the Immigration file next following the interrogation of December 4, 1924, being Form No. 256 entitled "Application for Immigration Visa (Nonquota)," subscribed and sworn to by Louie Foo before the American Vice Consul at Hong Kong and bearing the American Consulate seal. In the body of this form, Louie Foo stated the names and places of residence of his minor children as being:

"Louie Hoy Kay, male, address, Hang Mee Vil., Toy Shan, China.  
 Louie Hoy Park, male, address                      do "

On the back of this form will be noted the picture of Louie Foo with his signature thereon and a cancellation of the fee stamp and also the seal of the American Consulate imprinted so as to partially cover the photograph of this witness, Louie Foo. While this is strictly impeaching testimony and perhaps should be considered only in determining the weight that should be given to Louie Foo's testimony as a whole, it is inconceivable that a mistake could have been made by three separate government officials to whom Louie Foo reported the birth of

a second son. The testimony of Louie Foo at the trial of this case in this regard must necessarily be false or, in the alternative, the testimony given to the American Vice Consulate at Hong Kong and to the Immigration officials at Seattle was false. Further, in reviewing the transcript of testimony to determine the weight and credibility to be given to the testimony of Louie Foo, this Court will note that although Louie Foo asserted that his parents returned to China when he was but a small boy, he was extremely vague as to incidents concerning his childhood. While the self-serving statements of appellant and his alleged father with reference to Louie Foo's having been born in the United States were not contradicted by direct evidence, yet their testimony was so contradictory and unsupported that it was not worthy of belief. Therefore, any burden that was imposed upon the government to rebut any presumption that may have existed by virtue of the decree of delayed registration of the birth of Louie Foo, has surely been fully overcome.

The Court below was fully justified in determining as he did when referring to the testimony of Louie Foo (R. 13):

"The Immigration and Naturalization file \* \* \* contains numerous documents which show questions propounded to him by immigration officials and his answers. The great bulk of these documents are dated from 1907 to 1924. They show that, as early as 1907, he was requested to submit proof of his citizenship and that this request was repeated on several occasions thereafter. His answers to these interrogatories concerning his early life and his parents were just as vague and just as unsatisfactory as his testimony at the trial."

This Court said in *Wong Ken Foon v. Brownell*, *supra*:

“Some of the testimony of the alleged father and of the alleged son was in the judgment of the court inherently improbable and unbelievable.”

This Court further stated in *Lew Wah Fook v. Brownell*, 218 F.2d 924, 925:

“The guardian says he is the ward’s father, and the ward says the guardian is his father. ‘The mere say-so of interested witnesses does not have to be accepted \* \* \*.’ *Flynn ex rel. Yee Suey v. Ward*, 1 Cir., 104 F.2d 900-902. See *Siu Say v. Nagle*, 9 Cir., 295 F. 676, wherein is stated: ‘In cases of this character experience has demonstrated that the testimony of the parties in interest as to the *mere fact of relationship cannot be safely accepted or relied upon* \* \* \*.’”

- (c) Certificate of Identity, No. 54325 as a merchant, issued to Louie Foo by Immigration officials, Seattle (Exh. 4).

The most that can be said for this contention by appellant is to adopt counsel’s language (Br. 12): “This certificate of identity entitles him to remain in the United States and is a *prima facie* right of the holder to remain in the United States.” Then follows citation of three cases pertaining to deportation proceedings instituted against the holder of such a certificate of identity. These cases have no pertinency to the issues presented in this case. We are not trying a deportation case against Louie Foo. There is no contest at present pertaining to the right of Louie Foo to remain in the United States. The issue is whether Louie Foo was a citizen of the



United States at the time of the birth of his alleged son, Louie Hoy Gay. The certificate of identity issued to Louie Foo is no evidence whatsoever that he was ever considered to be a citizen of the United States.

(d) United States Army Draft Registration of Louie Foo (Exh. 5).

(e) Voting Registration of Multnomah County, Oregon, from 1928 to 1941 (Exh. 6).

These two contentions will be considered together. Appellant makes no contention that the mere fact that Louie Foo registered for the United States Army draft in both world wars is any evidence at all that he is a citizen of the United States. Neither does he contend that because of the fact that Louie Foo registered as a voter in Multnomah County, Oregon in the years stated is to be treated as evidence of citizenship of this individual. Counsel does cite the case of *Chin Wing Dong v. Clark*, 76 F. Supp. 648 (DC WD Wn., N.D.), in support of his position. However, a reading of that case clearly distinguishes it from the present case. In that case, the plaintiff was admitted in 1908 at San Francisco, as the Chinese-born son of an American-born father. Subsequently, a certificate of citizenship was denied the petitioner and eventually a suit was filed under the Nationality Act of 1940, 8 USCA 903, for a judicial declaration that he was a citizen of the United States and that he had been denied the rights and privileges as such. This case was apparently filed in 1947 and Judge Black rendered his decision in the State of Washington on February 18, 1948. Louie Foo was never ad-

mitted into the United States as a citizen nor has he ever been recognized as such. He at all times was fully aware that his citizenship was in dispute, but he has never seen fit to bring a 503 suit so as to have a judicial determination of his claim to citizenship. Under all of the evidence submitted in the *Chin Wing Dong* case, Judge Black determined that by the preponderance of the evidence, the petitioner was entitled to a decree of the court determining him to be a citizen of the United States. We do not see how that case is pertinent to the issues herein involved.

The Court below, in determining that plaintiff has failed to prove by a preponderance of evidence that he is the son of Louie Foo, and further, that plaintiff has failed to prove by a preponderance of the evidence that said Louie Foo was a citizen of the United States by birth or naturalization, was fully justified and surely was not clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure). Under this rule, the appellate court is precluded from disturbing the findings of the Court below unless they are clearly erroneous.

## CONCLUSION

The evidence presented by plaintiff was vague, contradictory and unsatisfactory. The Court below had the opportunity to observe the witnesses and the manner in which they testified, and was thereby fully capable of determining the weight and credibility to be given to the testimony offered on behalf of plaintiff. His decision in denying the petition of plaintiff should be affirmed.

Dated, Portland, Oregon, April 26, 1957.

Respectfully submitted,

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